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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Janet B. Stone, and each of the other plaintiffs named in the caption of the Petition for Writ of Certiorari ("Petition") filed in this matter, respectfully submit this Supplemental Brief in Support of Petition for Writ of Certiorari ("Supplemental Brief") under Rule 15.8 of the Rules of the Supreme Court of the United States. Plaintiffs submit this Supplemental Brief for purposes of inviting to the Court's attention new cases and intervening matter not available at the time of their last filing. Specifically, plaintiffs hereby inform the Court that the decision of the United States Court of Appeals for the First Circuit in *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998),

cited and discussed at length in the Petition, has been withdrawn pursuant to the Order of the First Circuit Court of Appeals, sitting *en banc*. *Irving v. United States*, 146 F.3d 12 (1st Cir. 1998).[1]

In their Petition, plaintiffs analyzed how the decision below by the Supreme Court of North Carolina in *Stone* conflicted with the most recent decision of the First Circuit in *Irving*. The *Stone* decision improperly held, at the Rule 12(b)(6) stage, that negligent inspection activities conducted pursuant to the Occupational Safety & Health Act of 1970 ("the Federal OSHA Act") could not give rise to a duty of care being owed to the affected workers.[2] By contrast, *Irving* had allowed an employee injured as a proximate result of negligent OSHA inspections to recover for her injuries. The conflict between the decision below and the decision in *Irving* was among the grounds plaintiffs identified for review under Rule 10(b) of the Rules of the Supreme Court of the United States. Particularly, a state court of last resort in *Stone* had decided an important Federal question in a way that conflicted with the decision of a United States Court of Appeals in *Irving*.

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[1] The order withdrawing the most recent opinion in *Irving* had been entered, but not yet reported, when plaintiffs initially filed their Petition. The order was reported between the time of submision of plaintiffs' initial petition and the time that it was resubmitted in proper format pursuant to the 8 July 1998 Order of the Honorable William K. Suter, Clerk of the Supreme Court of the United States. Before re-submission, counsel for plaintiffs inquired of the Office of the Clerk whether the subsequent history in *Irving* and its effects should be discused in the re-submitted Petition, or whether they should be made known to the Court by supplemental brief pursuant to Rule 15.8. Based upon the direction of the Office of the Clerk, plaintiffs preserved the substance of their initial filing and now submit this Supplemental Brief to address the case history in *Irving*.

[2] Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The *en banc* order of the First Circuit withdrawing the panel's 8 April 1998 *Irving* opinion doubtless affects the specific comparison between the language of that decision and the language of *Stone*. Nonetheless, a direct conflict remains between the jurisprudence of the First Circuit and of the Supreme Court of North Carolina. To demonstrate the continuing conflict, plaintiffs outline briefly the history of the *Irving* matter. Then, they demonstrate that the conflict still exists. Finally, because the importance of the Question Presented in plaintiffs' Petition has now been heightened due to *en banc* reconsideration of *Irving*, plaintiffs show the Court that this case merits review on Writ of Certiorari even more strongly now than before.

I. THE IRVING CASES PROPERLY DECLARE THE LAW.

The *Irving* suit arose after Federal OSHA compliance officers had inspected the plaintiff's place of employment in a Somerset, New Hampshire shoe factory on more than one occasion during the late 1970's. They negligently inspected the premises, failing to disclose that the plaintiff was working in close proximity to a hazardous machine that violated OSHA standards. On 10 October 1979, the plaintiff's hair came in contact with equipment and scalped her, resulting in gruesome and permanent injuries.

The United States District Court for the District of New Hampshire initially held that the plaintiff had stated a claim upon which relief could be granted. *Irving v. United States*, 532 F. Supp. 840 (D.N.H. 1982). The court then tried the suit and, after trial, dismissed it without reaching the merits. Apparently, it reasoned that this Court's decision in *Berkovitz v. United States*, 489 U.S. 531, 108 S.Ct. 1954, 100 L.Ed.2d 531 (1988), interpreting the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C.S. § 2680(a), had so expanded that legislation as to prevent any governmental liability for negligent OSHA inspections. *Irving v. United*

States, 909 F.2d 598, 599 (1st Cir. 1990). However, on appeal, the First Circuit corrected the District Court's mistaken notion, vacated its decision in an unpublished opinion, and remanded it for further consideration. *Irving v. United States*, 867 F.2d 606 (1st Cir. 1988) (table of opinions) (hereafter, "*Irving I*").

On remand, the District Court failed to follow the mandate of the Court of Appeals directing that it make certain findings, and again dismissed the case without an analysis of the evidence. The plaintiff appealed. The First Circuit then issued a published opinion, *Irving v. United States*, 909 F.2d 598 (1st Cir. 1990) (hereafter, "*Irving II*"), in which it rejected the proposition that all negligent OSHA inspections are immune from suit under the discretionary function exception to the Federal Tort Claims Act ("FTCA"). In pertinent part, *Irving II* states as follows:

> The Supreme Court [of the United States] has emphatically rejected the assertion that "the [discretionary function] exception precludes liability for any and all acts arising out of regulatory programs of federal agencies." *Berkovitz* [*v. United States*, 489 U.S. 531, 538, 108 S.Ct. 1954, 1960, 100 L.Ed.2d 531 (1988)]. Instead, the inquiry focuses on the permissible range of action available to the government employees allegedly at fault.

Irving II, 909 F.2d at 600. Moreover, *Irving II* cites a fair number of cases allowing suits to proceed for negligent inspection by governmental employees, *id.* at 601, and does not even suggest that a uniquely governmental purpose in undertaking inspection or enforcement activities somehow entitles the government to a blanket immunity.

Even after the First Circuit remanded for specific findings, the trial court again failed to make them and again ruled against the plaintiff. *Irving v. United States*, 1994 WL 287750 (D.N.H. 1994), *reh'g denied*, 1994 WL

392614 (D.N.H. 1994). The plaintiff again appealed, and the First Circuit Court of Appeals again vacated and remanded. This decision, reported as *Irving v. United States*, 49 F.3d 830 (1st Cir. 1995) and referred to herein as "*Irving III*," reaffirmed that negligent governmental inspections are not *per se* immune from suit. Rather, if the evidence shows actionable negligence by a governmental employee, the claim can survive. *Id.* at 833.

The case was tried to a new judge, who rendered a decision finding the government negligent and awarding the plaintiff compensatory damages under the FTCA. *Irving v. U.S.*, 942 F. Supp. 1483, 1504, n.26 (D.N.H. 1996). The District Court rejected the government's argument that there is immunity from liability for a "uniquely governmental function," such as regulatory enforcement activities. *Id.* at 1504, n.26. It held that the government's theory was groundless, as it directly conflicted with the decisions of this Court in *Indian Towing Co. v. United States*, 350 U.S. 61, 67, 76 S.Ct. 122, 125-26, 100 L.Ed. 48 (1954) and *Berkovitz, supra*, 486 U.S. at 538-39, 108 S.Ct. at 1959-60.

The First Circuit affirmed the award in *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998) (hereafter, "*Irving IV*"). Plaintiffs discussed *Irving IV* extensively in their Petition. Their reason for doing so without devoting similar attention to previous opinions in the case was that *Irving IV* had completed the fact-finding process and constituted the last word of a fully-litigated dispute. While the First Circuit Court of Appeals withdrew the *Irving IV* opinion *en banc*, 146 F.3d 12 (1st Cir. 1998) (hereafter, "*Irving V*"), that order did not purport to change or overrule the rationale underlying the earlier *Irving* decisions.

Because *Irving V* has changed nothing substantive, the law of the First Circuit still holds that claims based on negligent OSHA inspections are not *per se* subject to dismissal under the FTCA. As discussed in plaintiffs' Peti-

tion, that standard is based upon and consistent with the decisions of this Court. Because *Stone* does create such a *per se* rule of immunity in direct conflict with the FTCA and the Federal OSHA Act, the decision below must be reviewed and reversed.

II. THE CONFLICT REMAINS BETWEEN STONE AND IRVING.

None of the *Irving* opinions suggest that federal regulatory inspections are subject to *per se* immunity from suit under the Federal Tort Claims Act. Nor is this situation surprising, since the court in *Irving III* reiterated that the prior decisions were binding unless and until the Supreme Court of the United States, Congress or the First Circuit itself sitting *en banc* changed the law. *Irving III*, 49 F.3d at 835. Thus, the mere fact that a governmental entity is engaged in regulatory inspection and enforcement activities does not provide it with per se immunity from negligence liability.

The Supreme Court of North Carolina's decision in *Stone* is in direct conflict with that standard. As discussed in the Petition, *Stone* immunized completely from tort liability the defendants' enforcement activities solely because they were governmental in nature. Petition at 10; 6a; 10a-11a. The mere fact that the First Circuit *en banc* has vacated *Irving IV* does not vitiate the earlier *Irving* decisions. More importantly, it has no effect on the decisions of this Court holding that a tortfeasor's conduct resulting in injury is subject to suit regardless of whether it had a "uniquely governmental" function or purpose when undertaking the conduct. *See, e.g., Indian Towing Co., supra*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (governmental function of operating a Coast Guard not immune); *Rayonier Incorporated v. United States*, 352 U.S. 315, 77 S.Ct. 374 (1957) (governmental function of managing and fighting forest fires on government land not immune).

The result of the First Circuit withdrawing the opinion in *Irving IV*, but leaving undisturbed earlier decisions declaring that the law allows recovery for negligent OSHA inspection activities in at least some circumstances, is that a conflict still exists between the First Circuit and the Supreme Court of North Carolina. State OSHA programs must be at least as effective as the Federal program "in providing safe and healthful employment and places of employment." 29 U.S.C.S. § 667 (1990). The Supreme Court of North Carolina in *Stone* failed to enforce this part of the Federal OSHA Act by permitting less protection for workers under the North Carolina OSHA program than what would have been provided to them under the Federal OSHA Act and the FTCA if the Federal Government had been carrying out occupational safety and health duties in North Carolina.

III. THE QUESTION PRESENTED IN PLAINTIFFS' PETITION IS EVEN MORE COMPELLING IN LIGHT OF THE FACT THAT A FIRST CIRCUIT EN BANC DECISION MUST BE RENDERED.

Regardless of what the First Circuit's ultimate decision may be in *Irving*, the case at bar should be reviewed. If the First Circuit, sitting *en banc*, determines that the *Irving* plaintiff is entitled to recover, the conflict between the First Circuit and the Supreme Court of North Carolina would continue to exist and the issue would still need a resolution by this Court to bring harmony to the law. However, if the First Circuit decides to ignore the decisions of this Court in *Indian Towing* and *Rayonier* and concludes that so-called uniquely governmental functions, such as OSHA inspections, are entitled to per se immunity from suit, then all the greater reason exists to allow not only plaintiffs' Petition here, but also the *Irving* plaintiff's likely petition for a writ of certiorari so that this Court can resolve the law at one time and without the rights of the injured plaintiffs in both suits being impaired. The timing of the *Irving* decisions and the im-

portant questions of federalism that arise where a State assumes a duty to meet federal standards, fails to do so, and then hides behind state law doctrines to avoid liability, call strongly for this Court to allow the Petition for a Writ of Certiorari and to permit plaintiffs to proceed with their case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the decision of the Supreme Court of North Carolina reversed, and the case remanded for further proceedings not inconsistent therewith.

Respectfully submitted,

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